

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

FILED
FEB 11 2009
S. D. CLERK

| | | |
|---------------------------|---|------------------------------|
| UNITED STATES OF AMERICA, | * | CR 02-30017 |
| | * | CIV 07-3010 |
| Plaintiff, | * | OPINION AND ORDER ADOPTING |
| -vs- | * | REPORT AND RECOMMENDATION |
| GARY FLUTE, SR., | * | AND DENYING |
| | * | MOTION TO VACATE SENTENCE |
| Defendant. | * | AND ORDER DENYING |
| | * | CERTIFICATE OF APPEALABILITY |
| | * | |

Defendant was convicted of two counts of sexual abuse of a minor, two counts of aggravated sexual abuse of a child, and one count of incest, all involving his daughters. He was sentenced on February 26, 2003, to a total sentence of 372 months imprisonment. He appealed his convictions and sentences to the United States Court of Appeals for the Eighth Circuit and the Eighth Circuit affirmed on April 5, 2004. United States v. Flute, 363 F.3d 676 (8th Cir. 2004). The mandate was filed on November 14, 2005. Certiorari was denied by the United States Supreme Court on March 6, 2006.

Defendant filed a motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255 on March 9, 2007. The Court submitted the above-entitled matter to U.S. Magistrate Judge Mark A. Moreno and the magistrate judge submitted his report and recommendation to the Court on December 10, 2008, Doc. 160. The report and recommendation was served on the petitioner as required by 28 U.S.C. § 636. Petitioner timely filed objections. He also filed a supplement to objections and a supplement to the record of exhibits. The Court has conducted a *de novo* review of the file.

I was the trial judge and observed counsel. I also heard all the evidence and arguments. I have read the report and recommendation and the defendant's responses thereto. I find that the report and recommendation of the magistrate judge should be accepted and the motion to vacate should be denied.

Based upon the foregoing,

IT IS ORDERED:

1. The report and recommendation of the U.S. Magistrate Judge, Doc. 160, shall be and is hereby adopted as the findings of fact and conclusions of law herein.
2. The defendant's objections, Doc. 162, supplement to objections, Doc. 163, and supplement to the record, Doc. 164, are overruled.
3. The motion to vacate, set aside, or correct defendant's conviction and sentence, Doc. 137, is denied.
4. The motions, Docs. 138, 145, and 146 are denied.

IT IS HEREBY CERTIFIED that there does not exist probable cause of an appealable issue with respect to the Court's order denying petitioner's motion to vacate, set aside, or correct sentence. No certificate of appealability will be granted. 28 U.S.C. § 2253(c). This in no way hampers the petitioner's ability to request issuance of the certificate by a circuit judge pursuant to Fed. R. App. P. 22.

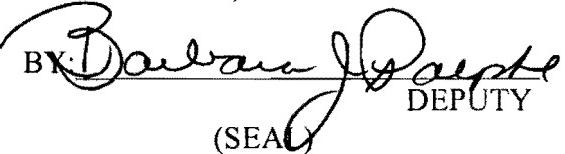
Dated this 10th day of February, 2010.

BY THE COURT:


CHARLES B. KORNMANN
United States District Judge

ATTEST:

JOSEPH HAAS, CLERK


BY: Barbara J. Daube DEPUTY
(SEA)